

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00548

In the matter between:

TRANSNAMIB HOLDINGS LIMITED

APPLICANT

and

ANICET BAUM N.O.

1ST RESPONDENT

ALAPEJE NAMBIRA

2ND RESPONDENT

AIR NAMIBIA (PTY) LTD (IN LIQUIDATION)

3RD RESPONDENT

MASTER OF THE HIGH COURT

4TH RESPONDENT

Neutral Citation: *Transnamib Holdings Limited v Baum N.O.* (HC-MD-CIV-MOT-GEN-2022/00548) [2024] NAHCMD 208 (3 May 2024)

Coram: OOSTHUIZEN J

Heard: 31 August 2023

Delivered: 3 May 2024

Flynote: Rule 103(1)(a) — Rescission of order erroneously granted in absence of party affected thereby — Superannuation — Execution only in prescribed circumstances.

Summary: The applicant applied for the setting aside of a costs order granted against it in July 2019 under a different case in the absence of a notice of opposition by it in those proceedings. First respondent, after the expiry of three years subsequently to the impugned costs order had the order taxed and intended to execute thereon without complying with Rule 112(1) of the Rules of the High Court.

Held that: the costs order against applicant was erroneously granted in its absence and set aside in terms of Rule 103(1)(a) of the Rules of the High Court;

Held that: the taxation in respect of the applicant and writ of execution are set aside.

ORDER

IT IS ORDERED THAT:

1. The costs order granted by this Honourable Court, in case number HC-MD-CIV-MOT-GEN-2017/00004 in favour of the first respondent, against the applicant, on 18 July 2019, is rescinded and set aside in terms of Rule 103(1)(a) of the Rules of the High Court.
2. The taxing master's allocatur dated 13 October 2022 under case number HC-MD-CIV-MOT-GEN-2017/00004 against the applicant herein (the second respondent in case number HC-MD-CIV-MOT-GEN-2017/00004), is set aside.
3. The writ of execution dated 1 November 2022 under case number HC-MD-CIV-MOT-GEN-2017/00004 against the applicant herein, is set aside.
4. The judgment granted in favour of the applicant dated 31 May 2004 under case number I 890/2004 in the amount of N\$2 493 718.73 and annexed to the founding affidavit as annexure "JS 13", is revived.

5. The first respondent shall pay the applicant's costs under Part A and this Part B, including the costs of one instructing and one instructed counsel.

6. The matter is regarded as finalized and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

[1] The applicant herein was the second respondent in HC-MD-CIV-MOT-GEN-2017/00004 (the 2017 case).¹ The notice of motion in the last mentioned case prayed for costs against any respondent opposing.² Only the first respondent (the third respondent in this case) filed a notice of intention to oppose in the 2017 case.³

[2] The court in the 2017 case specifically found that the second respondent therein (the applicant in this case) was not authorized to oppose.⁴ The court correctly found that the second respondent in the 2017 case, did not even endeavour to make out a case that it authorized opposition,⁵ because it did not.

[3] Despite the above, costs were erroneously granted against the second respondent (applicant in this case), on 18 July 2019.⁶ Second respondent in the 2017 case (applicant in this case), not being represented, was absent during the 2017 case and when the order was issued.⁷ The applicant brought its application for the setting aside of the erroneous costs order against it, in its absence, within a reasonable time after it realized that first respondent intends to execute thereon.

¹ Record Index, p 8, para 4 and p 142, para 34.

² Record Index, p 11, paras 18 to 20 and pp 145 and 146, para 44.

³ Record Index, p 11, para 20 and pp 145 and 146, para 44.

⁴ Record Index, pp 12 and 13, paras 22 to 25.

⁵ Op cit.

⁶ Record Index, pp 159 and 160.

⁷ Op cit and Record Index, p 13, para 25.

[4] Rule 112 of the High Court Rules provides for superannuation of a judgment three years after pronouncing of the judgment.

[5] Rule 112 provides as follows:

'(1) A writ of execution may not be issued after the expiry of three years from the day on which a judgment has been pronounced, unless the -

(a) debtor consents to the issue of the writ; or

(b) judgment is revived by the court on notice to the debtor, but in such a case no new proof of the debt is required.'

[6] In view of my findings in respect of the erroneous costs order against the applicant, it follows that the taxation of a costs order against it was erroneous, unwarranted and ineffective.

[7] It is common cause that the applicant did not consent to the issuing of a writ of execution. It is also common cause that the court did not revive the erroneously pronounced judgment against the applicant (the second respondent) in the 2017 case.

[8] It follows that the writ of execution issued against the applicant (the second respondent in the 2017 case), was erroneously issued and is set aside.

[9] The applicant has complied with rule 112(1)(b) of the Rules of the High Court and the judgment of 31 May 2004 is revived in so far as it applies to the applicant.

[10] The applicant being successful, costs shall follow the result.

[11] In the result, the following orders are made:

1. The costs order granted by this Honourable Court, in case number HC-MD-CIV-MOT-GEN-2017/00004 in favour of the first respondent, against the applicant, on 18 July 2019, is rescinded and set aside in terms of Rule 103(1) (a) of the Rules of the High Court.

2. The taxing master's allocatur dated 13 October 2022 under case number HC-MD-CIV-MOT-GEN-2017/00004 against the applicant herein (the second respondent in case number HC-MD-CIV-MOT-GEN-2017/00004), is set aside.
3. The writ of execution dated 1 November 2022 under case number HC-MD-CIV-MOT-GEN-2017/00004 against the applicant herein, is set aside.
4. The judgment granted in favour of the applicant dated 31 May 2004 under case number I 890/2004 in the amount of N\$2 493 718.73 and annexed to the founding affidavit as annexure "JS 13", is revived.
5. The first respondent shall pay the applicant's costs under Part A and this Part B, including the costs of one instructing and one instructed counsel.
6. The matter is regarded as finalized and removed from the roll.

G H OOSTHUIZEN
JUDGE

APPEARANCE

APPLICANT: R Heathcote SC (Assisted By Van Der Westhuizen)
Instructed by Koep & Partners, Windhoek

RESPONDENTS: S Namandje,
of Sisa Namandje & Co. Inc., Windhoek